In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 864

LOWE BROTHERS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

We do not oppose the granting of a writ of certiorari in this case.

The case involves crediting of an overpayment in taxes for the year 1918 against a deficiency in taxes for the year 1917 in the amount of $11,230.14 at a time when the collection of the deficiency was barred by statute. Claim for refund of the 1917 deficiency, allegedly collected by the credit, was thereafter filed, and, upon rejection of the claim, suit was instituted in the District Court against the United States for the recovery of an asserted overpayment of taxes for 1917 in the amount of $11,230.14 (R. 1, 38). The Collector of Internal

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Revenue who was in office at the time the credit was made was out of office at the time suit was instituted (R. 3, 13).

The District Court dismissed the petition on the ground that the application of the sum of $11,-230.14 in suit, arising from overpayment of tax for the year 1918, to the barred tax for the year 1917 was void and consequently did not constitute an overpayment of tax for the year 1917 under the provisions of Section 607 (U. S. C., Title 26, Sec. 1670) of the Revenue Act of 1928, c. 852, 45 Stat. 791, by reason of the restrictive features of Section 609 (U. S. C., Title 26, Sec. 1675) of that Act (R. 30–34, 39): The Circuit Court of Appeals, following its decision in *United States* v. *John Gallagher Co.*, 83 F. (2d) 368, held that this ruling constituted error. However, the court below further held that the judgment of the District Court dismissing the petition must nevertheless be affirmed for lack of jurisdiction in the District Court to entertain the suit, citing its decision in *United States* v. *Reeves Bros. Co.*, 83 F. (2d) 121, and the decision of the Circuit Court of Appeals for the Second Circuit in *Moses* v. *United States*, 61 F. (2d) 791. On this point the theory of the court below is that the jurisdiction conferred upon District Courts to entertain suits against the United States for the recovery of an illegally or erroneously exacted tax in excess of $10,000 is limited to cases where the tax was collected by a Col-

lector of Internal Revenue who is dead or out of office, and that here the tax was not collected by a collector.

The petition for a writ of certiorari alleges that the decision of the court below on the question of the jurisdiction of the District Court is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *United States* v. *Piedmont Mfg. Co.*, 89 F. (2d) 296. We agree that these decisions may not be distinguished.

The holding of the court below that the District Court erred in ruling that the application of an overpayment of tax for one year against a barred deficiency for another year does not constitute an overpayment of tax for the year of the deficiency conflicts with numerous decisions of the Court of Claims, among which are *Parks & Woolson Mach. Co.* v. *United States,* 58 F. (2d) 868, certiorari denied, 287 U. S. 634; *Rosenstadt & Waller* v. *United States,* 7 F. Supp. 287; and *American Steam Conveyor Corp.* v. *United States,* 10 F. Supp. 571, certiorari denied, 296 U. S. 599. Compare *First Nat. Bank of Beaver Falls* v. *United States,* 8 F. Supp. 484 (C. Cls.), motion for leave to file a second motion for a new trial denied, 9 F. Supp. 424 (C. Cls.), certiorari denied, 294 U. S. 717, and *H & B American Mach. Co.* v. *United States,* 11 F. Supp. 48 (C. Cls.), petition for a writ of certiorari dismissed per stipulation of counsel, 297 U. S. 726, in which latter case the point here dis-

cussed was not raised in the Court of Claims until the filing of a motion for a new trial.

In view of the conflicting decisions, we do not feel justified in opposing the petition for a writ of certiorari.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

MARCH 1938.

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